



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2004

Mr. C. Brian Cassidy
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OR2004-10559

Dear Mr. Cassidy:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 215076.

The Central Texas Regional Mobility Authority (the "authority"), which you represent, received a request for various information, including certain authority policy drafts; information concerning the business holdings of authority board members; a list of all contractors with the authority, including the contracts; and all communications between and amongst board members, employees, contractors and subcontractors. You indicate that the authority will make some information available to the requestor. You claim that a portion of the requested information that you have submitted is not subject to the Act. You claim that the remaining submitted information, or portions thereof, is excepted from disclosure under sections 552.107, 552.111, 552.136 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we address your claim that portions of the information labeled Exhibit F, specifically personal calendar entries made by authority board members, are not subject to the Act. You state you will release the calendar entries that relate to authority business, which you have highlighted. Section 552.002 of the Act defines "public information" as consisting of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). You inform us that the authority does not provide calendars of any type to its board members. You advise, and Exhibit F reflects, that authority board members may record authority-related business on their personal or business calendars if they so choose. You further advise that these calendars are dedicated to the other work and businesses of the authority's board members. You assert that these calendars were not collected, assembled, or maintained under any law or ordinance or in connection with the transaction of any official business. Based on your representations and our review of the calendar entries in question, we conclude that these calendar entries do not fall within the definition of public information under section 552.002. *Cf.* Open Records Decision No. 635 at 8 (1995) (personal calendar purchased and maintained by governmental employee who had sole access to it not subject to Act). Therefore, the Act does not require the authority to release these calendar entries to the requestor.

Next, we note that some of the submitted information contained in Exhibit B is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Exhibit B contains information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body. These documents are expressly public under section 552.022(a)(3) unless they are confidential under other law. Although you claim that this information, which we have marked, is excepted under section 552.107, this section is a discretionary exception to disclosure and therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Therefore, the authority may not withhold the documents within Exhibit B that are subject to section 552.022(a)(3) under section 552.107. However, the Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City*

of Georgetown, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether any of the submitted information is protected from disclosure under Texas Rule of Evidence 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. TEX. R. EVID. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the submitted documents constitute communications between privileged parties made for the purpose of facilitating the rendition of professional legal services to the authority. You have also identified the parties to the communications. We have reviewed the submitted information and find that this information reflects confidential attorney-client communications. The authority may withhold the information we have marked in Exhibit B pursuant to Rule 503 of the Texas Rules of Evidence.

Next, we consider the applicability of section 552.107 to the remaining information you have highlighted in Exhibit B that is not subject to section 552.022. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition - of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You state that the documents at issue in Exhibit B are communications between the authority and its representatives and the authority’s legal counsel. You further explain that the communications were intended to be confidential and they have not been shared with any non-privileged parties. Based on your arguments and our

review of the submitted information, we agree that the remaining information in Exhibit B may be withheld under section 552.107(1).¹

Next, we address the applicability of section 552.111 to the information labeled Exhibit A. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency,” and encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). An agency’s policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Furthermore, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1993). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

You indicate that Exhibit A consists of a preliminary draft of a Conversion and Transfer Policy (“policy”), the final version of which will provide guidance to the authority when it requests conversions by the Texas Transportation Commission of non-tolled segments of state highways to turnpike projects or transfers of Texas Department of Transportation-owned turnpike projects to the authority. You also state that, at the completion of securing internal and interagency comments, the authority will release the policy for public input prior to final adoption. Based on your representations and our review, we agree that the submitted draft policy is excepted from disclosure under section 552.111 and may be withheld on that basis.

We next address the applicability of section 552.136 to the information labeled Exhibits D and E. Section 552.136 provides in relevant part:

¹As our ruling is dispositive, we need not consider the applicability of section 552.137 to e-mail addresses contained in the information at issue.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, we agree that the authority must withhold most of the credit card, debit card and other access device numbers you have marked under section 552.136. We note, however, that some of the information you have highlighted, including mobile telephone numbers, are not excepted from disclosure under section 552.136. We have marked the information that is not excepted from disclosure under section 552.136. As you make no other arguments against disclosure for this information, it must be released to the requestor.

Finally, we address the applicability of section 552.137 to Exhibits C and E. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

- (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
- (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137(a) is applicable to certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Section 552.137(a) is not applicable to the types of e-mail addresses listed in section 552.137(c) or to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Therefore, the authority must withhold as confidential under section 552.137 personal e-mail addresses, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure. We have marked for release one e-mail address contained in Exhibit B that you have highlighted but that is an e-mail address maintained by a governmental entity for one of its employees.

In summary, the authority may withhold the information we have marked in Exhibit B pursuant to Rule 503 of the Texas Rules of Evidence. The remaining information in Exhibit B may be withheld under section 552.107(1). The draft policy in Exhibit A may be withheld under section 552.111. With the exception of the information that we have marked for release, the authority must withhold the credit card, debit card and other access device numbers you have marked under section 552.136. Unless the authority has received consent from the owners of the personal e-mail addresses at issue, the personal e-mail addresses must be withheld from disclosure. All remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID#215076

Enc. Submitted documents

c: Mr. Sal Costello
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(w/o enclosures)